GAO BID PROTESTS

RESEARCH NOTES

PROCEDURAL ISSUES

21.0 Definitions

1. "Interested party": Where protester has stated that it is unable to submit a proposal for the work (because of alleged bundling and restrictive specs) and is unable to team with another company, it is not an interested party eligible to protest other aspects of the procurement (e.g., unfair advantage to the incumbent). *Outdoor Venture Company,* B-299675 (July 19, 2007).
2. Where the protester did not submit a bid, it cannot challenge the agency's award calculations. *NCS Technologies, Inc.,* B-405192.2, Oct. 27, 2011, n. 4.
3. See also: OMB Circular A-76 decisions.
4. "A protester is not an interested arty where it could not be considered for an award even if its protest were to be sustained." *Yoosung T&S, Ltd.,* B-291407, Nov. 15, 2002, 2002 CPD ¶204.
5. A protester is not an interested party when it ranks behind offeror #2, even it we assume a higher rating, and where it has not challenged the evaluation of offeror #2. It is not in line for award. *Joint Mgmt. & Tech. Serv.,* B-294229, Sep. 22, 2004, 2004 CPD ¶208.
6. Even if protester is correct and can establish the improprieties claimed, protester's claim does not affect the relative standing of the unsuccessful offerors. Protester lacks the necessary direct economic interest, as it would not be next in line for award even if its protest were sustained. *Federal Information Technologies, inc.,* B-240855, Sep. 20, 1990, 90-2 CPD 245.
7. A parent company is not an interested party to protest on behalf of its wholly-owned subsidiary, where the sub was the entity that submitted the proposal. *Integral Systems, Inc.,* B-405303.1, Aug. 16, 2011.

21.1 Filing a Protest; Motions to Dismiss

1. Standing: Protester does not have standing to complain that agency failed to obtain full competition, when protester itself had an opportunity to compete. Cattlemen's Meat Co., B-296616 n 1 (8/30/05).
2. A protester is not an interested party to challenge an agency's actions with regard to other offerors' proposals. *Brian X. Scott,* 2006 CPD 156, B-298568 (Oct. 26, 2006).
3. Ordinarily, elimination from the competitive range renders a protester not an interested party to challenge award to an offeror remaining in the competitive range; however, where the range has been limited to one offeror, the protester has standing. *Brian X. Scott,* 2006 CPD 156, B-298568 (Oct. 26, 2006), n.6.

4. Protesters must "provide, at a minimum, either allegations or evidence sufficient, if uncontroverted, to establish the likelihood that the protester will prevail in its claim of improper agency activity." *SAIC*, B-265607, Sep. 1, 1995, 95-2 CPD ¶99. "Unsupported assertions that are mere speculation . . . do not provide an adequate basis for protest." *Robert Wall Edge*, B-234469.2, Mar. 30, 1989, 89-1 CPD ¶335.
5. When the basis for the protest is factually incorrect, there is no reason to give further consideration to the issue. *Rentfrow, Inc.*, B-243215, July 5, 1991, 91-2 CPD 25. *The Refinishsing Touch*, B-293562, Apr. 15, 2004, 2004 CPD ¶92; *Norura Enter., Inc.*, B-254581, Sep. 15, 1993, 93-2 CPD ¶170.
6. Procurement Integrity Act violations must eb brought to the agency's attention within 14 days of when the protester, or a responsible person employed by the protester, knew of the violation, or else the protest will be dismissed. *AIS Engrg., Inc.*, B-406186, Mar. 7, 2012, x CPD x, n.8.
7. The GAO will not permit a protester to embark ion a fishing expedition for grounds of protest merely because it seeks to dislodge an award from a competitor. *Alascan, Inc.*, B-250407, May 26, 1993, 93-1 CPD ¶411.

21.2 Time for Filing

1. Protest challenging a solicitation that has not yet been issued is premature. *Aeronautical Components, Inc.*, B-253719, 6/17/93, 93-1 CPD X; protest against a Fedbizopps notice of intent to award a sole-source contract is premature, where agency has not yet finalized its course of action. *ITT Electronic Systems*, B-299150 (2/2/07).
2. Protests based on alleged improprieties in the solicitation, which are apparent prior to the closing date, must be filed before that date. Securiguard/Group 4, B-280429, 98-2 CPD 118 (9/30/98). COFC follows this same rule. *EDP Enters., Inc. v. US*, 2003 WL 21354617 (Fed.Cl. 5-30-03).
3. Protest not based on a solicitation must be filed within 10 days of when the basis becomes known. FR Countermeasures, Inc., B-295375, 2005 CPD 52 (2/10/05) (supplemental protest untimely, where it is based on information contained in an early document production).
4. Corrective action, and a new award decision, do not revive an otherwise untimely issue, where the basis of the issue concerns an aspect of the evaluation that was not affected by the corrective action. *Shaw-Parsons Infrastructure Recovery Consultants, LLC*, B-401679.4, March 10, 2010, 2010 CPD ¶77, n. 13.
5. "A protester may not passively await information providing a basis for protest. Rather, a protester has an affirmative obligation to diligently pursue such information [citation omitted], and a protester's failure to utilize the most expeditious information-gathering approach under the circumstances may constitute a failure to meet its obligation in this regard." *Waterfront Technologies, Inc.*, B-403638.3, Feb. 22, 2011. (Protester relied on a commercial service, not the official federal court website, for information on a pending COFC case, and re-filed its protest 37 days after dismissal of that case. This was not diligent, and the protest was untimely.)

6. A document that is filed by e-mail must be filed at "protests.gao.gov". Documents filed with any other address or with the individual GAO attorney are not "filed." *Andros Contracting, Inc.*, B-403117 (September 16, 2010).
7. A protester who is "reasonably aware" of a protest basis cannot wait until it obtains additional information before filing its protest. *Orbital Sciences Corp.*, B-400589, Dec. 15, 2008.
8. Supplemental protest grounds must be independently timely. FR Countermeasures. Id.
9. Protest is timely if filed within 10 days of denial of a timely agency-level protest, but issues raised at GAO must be independently timely, so if not raised at the agency, they may be untimely at GAO. Rochester Optical Mfg. Co, 2004 WL 1462093, n 3 (3/16/04); Systems, Studies and Simulation, Inc., B-295579, 2005 CPD 78 (3/28/05); because the regulations do not provide for unwarranted piecemeal presentation, additional grounds of protest raised at GAO, not raised at the agency, must independently meet the timeliness rules. Systems, Studies and Simulation, Inc., B-295579, 2005 CPD 78 (3/28/05).
10. Where agency-level protest was untimely (more than 10 days after debriefing), a protest to GAO is also untimely. *Raith Engrg. & Mfrg. Co. W.L.L.*, B-298333.3, Jan. 9, 2007, 2007 CPD 9.
11. To be considered an agency-level protest, the protester must express dissatisfaction with the agency's action, and request corrective action. *SNAP, Inc.*, B-404397, December 2, 2010.
12. Protester cannot delay in filing a protest with the GAO until it eventually receives a decision from the agency. It may wait only a reasonable time. Three months after filing the agency protest is too long. *Sacramento Metropolitan Officials Assoc.*, B-230563, Mar. 16, 1988, 88-1 CPD 274.
13. The GAO "will not consider a protest challenging a procurement conducted on the basis of competitive proposals where a debriefing is requested and required, if the protest is filed before the debriefing date offered to the protester (even if the protest basis is known to the protester before the debriefing." *Pentec Environmental, Inc.*, B-276874, 97-1 CPD 199 (6/2/97), citing *The Real Estate Center*, B-274081, 96-2 CPD 74 (8/20/96).
14. Where a debriefing was not required (e.g., request came after 3 days), protester is entitled to file a protest within 10 days of the debriefing actually given, at which it learned the basis for its protest. *Raith Engrg. & Mfrg.*, B-298333.3, Jan. 9, 2007, 2007 CPD 9. But, in an FSS procurement, where no debriefing is required, the timeliness rules for protests after debriefings do not apply, and protester must file within 10 days of learning the basis for its protest. *MIL Corp.*, B-279508.2 (Jan. 6, 2006), 2006 CPD 34. Similarly, a debriefing in a Brooks Act (Par 36) procurement is not a "required" debriefing. *McKissack/URS Partners*, B-406489.2, Apr. 13, 2012 (unpublished).
15. Where protester raises broad grounds of protest in its initial submission, but fails to provide details within its knowledge until later, so that agency must make a further response, these later arguments must independently meet timeliness rules or they cannot be considered. Foundation Engineering Sciences, Inc., B-292834,

Dec. 12, 2003, 2003 CPD 229; Biospherics, Inc.**,** B-285065, July 13, 2000, 2000 CPD 118.

16. Once a bidder has been provided with the specific basis for rejection of its proposal, it must protest within 10 days; it cannot wait for a debriefing. *Atlantic Marine, Inc.*, B-239119, April 25, 1990, 90-1 CPD 427.
17. Notice of award in the Fedbizopps is constructive notice of the award on the date of notice. Protester has 10 days from that date to file a protest. *CBMC, Inc.*, B-295586, Jan. 6, 2005, 2005 CPD 2.
18. GAO's timeliness regulations do not turn on whether an agency has sent information to a particular designated address; rather, GAO looks to whether the relevant information was in fact received by the offeror. Further, the use of CCR information is not a requirement when providing notice of adverse action. *Hawker Beechcraft Defense Company, LLC,* B-406170, Dec. 22, 2011.
19. GAO assumes, in the absence of evidence to the contrary, that mail is received within one calendar week of its being sent. A party may therefore be charged with receipt of a letter on a certain date for purposes of timeliness. Valenzuela Engrg., Inc., B-277979, 12/9/97, 98-1 CPD 51.
20. Timely filing of agency protest or GAO protest depends on the working hours and days specified in the FAR, not the agency's actual working hours or days. *Raith Engrg. & Mfrg.*, B-298333.3 (1/9/07).
21. A challenge to the way an agency is conducting corrective action is analogous to a challenge to the solicitation, and must be timely filed. The protester cannot await the second award without raising its challenge. *Domain Name Alliance Registry,* B-310803.2 (Aug. 18, 2008).
22. A FOIA request does not toll the time for filing a protest. B-191850, 78-2 CPD 79.

21.3 Agency Report & Comments

1. Protester cannot raise arguments in its comments, if the basis for them was first disclosed at the debriefing. They are untimely. FR Countermeasures, Inc., B-295375, 2005 CPFD 52 (2/10/05).

2. Protest based on documents received early must be filed within 10 days of receipt. FR Countermeasures, Inc., B-295375, 2005 CPD 52 (2/10/05).

3. GAO will consider an Agency Report that is filed late (two days) "provided its lateness did not prejudice the protester." Metro Home Medical Supply, Inc., B-297262, n.2, 2005 CPD 220 (12/8/05) (no prejudice since protester was given the full time to respond), citing General Electric Co, B-228191, 12/14/87, 87-2 CPD 585; Military Agency Services, B-290414, 8/1/02, 2002 CPD 130.

21.4 Protective Orders

21.5 Protest Issues Not for Consideration

1**.** Matters of contract administration. 4 CFR 21.5(a).

2. The GAO has consistently declined to review subcontract procurements "for" the Government. *Compugen, Ltd.*, B-261769, Sep. 5, 1995, 95-2 CPD ¶103, or "by" the Government where the prime contractor conducted the acquisition. *Baron Services, Inc.*, B-402109, Dec. 24, 2009, 2009 CPD ¶264. *See also*, *Korrect Optical, Inc.*, B-405304, Aug. 11, 2011 (Dept. of Labor).

3. Violations of an internal agency instruction or directive would generally not constitute a valid basis of protest, since GAO's jurisdiction is limited to violations of procurement statutes or regulations. *Brian X, Scott*, B-298370, Aug. 18, 2006, n. 6.

4. Alleged collusion among subcontractors "involves a dispute between private parties for resolution through litigation, not the bid protest process." AJM Custom Built Inc., B-234110, 89-1 CPD 283 (3/16/89). So too is an alleged breach of a non-competition agreement. O'Gara-Hess & Eisenhardt Armoring Co., B-232491, 88-2 CPD 283 (9/23/88).

5. No jurisdiction to consider protest of the award of task or delivery orders. *Cartographics, LLC*, B-297121, 11/15/05, 2005 CPD 207; *United Info. Sys., Inc.*, B-282895 (6/22/99); *A&D Fire Prot., Inc. v. US*, 72 Fed.Cl. 126, 140 (2006). Similarly, there is no jurisdiction over protests concerning the modification of a task order, even if it increases the scope of the task order. *Global Computer Enterprises, Inc.*, B-310823 (Jan. 31, 2008).

6. GAO will consider a protest against the issuance of a task order that "precludes competition for future task or delivery orders for the duration of the contract performance period" since these may constitute a "downselection". *Palmetto GBA, LLC*, B-299154 (12/19/06); *Electro-Voice, Inc.*, B-278319 (1/15/98). The same is true where "specific categories of work" are foreclosed from competition. *Id.*; *Global Communications Solutions, Inc.*, B-291113, 2002 CPD 194 (11/15/02), but only where a vendor's future opportunity to compete for orders is expressly foreclosed fore the duration of the underlying IDIQ contract. (e.g., where the awardee is the recipient of all future orders under the category, with no provision to consider other bids for future orders.) *Doug Boyd Enterprises, LLC*, B-298237.2, Aug. 6, 2007.

7. GAO has jurisdiction over protests of task order awards under FSS contracts. *Severn Companies, Inc.*, B-275717.2, Apr. 28, 1997, 97-1 CPD 181. Court also has jurisdiction of such protests. *Idea International, Inc. v. US*, 74 Fed. Cl. 129 (2006); But see earlier case, doubting jurisdiction: *Group Seven Associates, LLC v. US*, 68 Fed. Cl. 28 (2005).

8. GAO "generally will not consider a protest against a contract modification, since modifications involve contract administration….[it] will review, however, an allegation that a contract modification went beyond the contract's scope and should have been the subject of a new procurement." GAO looks to COFC standard for cardinal changes. *Lawyers Cooperative Publishing Co.*, B-211273, December 5, 1983, 83-2 CPD 642. In addition, it will look to see if the contract has been materially modified, by examining changes in the type of work, performance period, and cost. GAO will consider whether the solicitation adequately advised offerors of the potential for this type of change, and thus,

whether the modification would have changed the field of competition. *Sallie Mae, Inc.*, B-400486 (November 21, 2008).

9. "The manner in which an agency seeks to satisfy its needs generally is a matter of agency policy choices that we do not review." *Lexis-Nexis*, B-260023, May 22, 1995, 95-2 CPD 14.

10. Agency decision to standardize software to insure interoperability is not a procurement decision that can be protested. *Ezenia!, Inc. v. US*, 2008 WL 80241 (Fed. Cl. 1/1/08).

11. GAO will consider protests alleging that an agency's determination to exercise an option, rather than conduct a new procurement, is unreasonable or violates law or regulation. An option to extend services under FAR 52.217-8, if not evaluated as party of the original award, constitutes a new procurement that must be justified as a sole source. *Major Contracting*. Court has jurisdiction to review allegation that agency improperly exercised options on other contractors contracts, but not on plaintiff's contract. *Magnum Opus Technologies, Inc. v. United States,* xx Fed. Cl. xx 2010 WL 2255523 (May 28, 2010).

12. The failure to release documents does not state a basis for protest. *DZS/Baker LLC*, B-281224, Jan. 12, 1999, 88-1 CPD ¶19, n. 7.

12. An agency's designation of a NAICS Code is a matter for resolution by the SBA, not the GAO. *BlueStar Energy Solutions*, B-405690, Dec. 12, 2011.

21.6 Suspension of Award

1. COFC had jurisdiction to review a challenge to an agency override of a suspension. *Ramcor Services Group, Inc. v. US*, 185 F.3d 1286 (Fed. Cir. 1999).
2. COFC need not issue an injunction. A declaratory judgment is sufficient to invalidate an override and restore the suspension. *Superior Helicopter LLC v. United States,* 78 Fed. Cl. 181 (2007); *Automation Technologies, Inc. v. US*, 72 Fed. Cl. 723 (2006); *Chapman Law Firm Co. v. US*, 65 Fed. Cl. 422 (2005).
3. A CICA suspension requires that the agency receive notice *from GAO*. *Florida Prof. Rev. Org., Inc.*, B-253908, Jan. 10, 1994, 94-1 CPD ¶17.
4. Only notice from GAO triggers a CICA suspension. *McDowell Welding v. Webb*, 829 F.2d 593 (6th Cir. 1987); *Technology for Communication Int'l, Inc. v. Garrett,* 783 F. Supp. 1446 (D.D.C. 1992).

21.7 Hearings

21.8 Remedies

1. GAO will recommend fees only where the protester submits a timely (within 60 days) and adequately documented claim. Piecemeal presentation of the claim is to be avoided. Adequate documentation includes the number of hours worked by employees, the purpose of the work, and the actual rates of compensation (plus O/H and fringe). Protester may forfeit its claim if its initial submission, though timely, is insufficient. *Al Long Ford*, B-297807.2 (Oct. 18, 2007).

2. Protester is "entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails." Blue Rock Structures, Inc., B-293134.2, 10/26/05, 2005 CPD 190. Exception; in appropriate cases, recovery is limited where a losing issue is so clearly severable from other issues as to constitute a separate protest. Honeywell Technology Solutions, inc., B-296860.3, 12/27/05, 2005 CPD 226. Severability depends on extent to which the claims are interrelated or intertwined, i.e., sharing a common core set of facts or based on related legal theories. Id. An issue is "clearly meritorious" when a reasonable inquiry shows the agency lacks a defensible position, and it is not a close question. Id.
3. Protester must submit evidence sufficient to support its claim that the costs were incurred, and are properly attributed to, filing and pursuing the protest. The amount claimed may be reimbursable to the extent it is supported by adequate documentation and is reasonable. Reasonable means that it is similar in nature and amount to what would be incurred by a prudent person. *BAE Technical Services, Inc.*, B-296699.3, 8/11/06.
4. Use of a "page count" method to estimate how much of a claim amount was devoted to the protest is acceptable. *BAE Technical Services*.
5. Fees are inappropriate where the agency takes corrective action before filing its Agency Report. Williamson County Ambulance Services, Inc., B-293811.4, 2004 CPD 200; QuanTech, Inc., B-291226.3, 2003 CPD 62 (3/17/03), even where the due date for that report has been extended. *Smith & Wesson, Inc.,* B-400479, November 20, 2008.
6. GAO will consider initial and supplemental protests separately for purposes of deciding if agency has taken corrective action before reporting on the supplemental protest, thus making a fee award inappropriate for that part. *PADCO, Inc.*, B-289096.3, 2000 CPD 135 (5/3/02).
7. Even where agency takes corrective action after submitting a report, fees may not be appropriate. Fees are granted when the agency delays action in a "clearly meritorious" protest, thereby causing protester unnecessary expense, and where the protest presents a "close question." "A protest is 'clearly meritorious' when a reasonable agency inquiry into the protester's allegations would show facts disclosing the absence of a defensible legal position." *Distributed Solutions, Inc.*, B-403566.2, Feb. 14, 2011. "The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated." *Waterfront Technologies, Inc.*, B-401948.8, Sep. 14, 2010, 2010 WL 3994252; *Lens, JV*, B-295952.4 (12/12/05), 2006 CPD 9.
8. Where a GAO attorney conducts "early outcome prediction" ADR and advises the agency that the protest is likely to be sustained, it is an indication that the protest is "clearly meritorious." *Greentree Transportation Company, Inc.*, B-403556.4, May 16, 2011; *T Square Logistics Servs. Corp.*, B-297790.4, Apr. 26, 2006, 2006 CPD 78. The fact that corrective action produced the same award decision does not make the protest any less meritorious. *Panacea Consulting, Inc.*, B-299307.3, Jul. 24, 2007.
9. When ADR shows that a protest issue is meritorious, fees will be awarded on that issue alone, where part of a protester's costs are attributable to an unsuccessful

issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. *Odle Mngmt. Group, LLC,* B-404855, Mar. 26, 2012, 2012 CPD ¶xx.

10. Fees are limited by CICA to $150/hr, unless an increase is warranted. An increase in the Consumer Price Index is sufficient justification. *Dept. of State*, B-295352 (8/18/05), 2005 CPD 145; *Sodexho Mgmt., Inc.*, B-289605.3, 2003 CPD 136 at 41 (8/6/03). A claimant need do no more than present the basis for adjustment. *EBSCO Publishing, inc.*, B-298918.4 (5/7/07) (approved use of CPI-U, the CPI for US City Average for All Items).
11. GAO has found hourly rates significantly in excess of the benchmark to be reasonable, e.g., $475/hr for partner in Washington firm. Blue Rock.
12. Time spent on settlement or debriefings is not compensable. Time spent on phone conversations must be documented. Blue Rock**.**
13. Deny whole claim if protester has aggregated allowable and unallowable costs so that GAO cannot tell what portion is unallowable. Blue Rock.
14. Employee time must be documented, including actual rates of compensation plus overhead and fringes, but profit will not be allowed. Blue Rock.
15. Protester gets "fees on fees" only if the agency delays the claim. Blue Rock; an agency may reasonably await the outcome of a court case involving the protest issues without incurring an obligation to pay the protester for pursuing fees. *BAE Technical Services.*
16. A protester can recover costs if the GAO sustains its protest, but the agency seeks reconsideration, thus compelling the protester to defend its favorable decision. *Security Consultants Group, Inc.*, B-293344.6, Nov. 4, 2004, 2004 CPD 228.
17. GAO generally accepts a protester's assertion of the number of hours worked, unless the agency identifies specific hours as excessive and articulates a reasoned analysis why the hours should be disallowed. *BAE Technical Services.*
18. Costs of travel are recoverable only if reasonable, measured by what a contractor would receive under a cost-reimbursement contract. *BAE Technical Services.*
19. Protester gets fees only if legally obligated to pay them. *TRS Research*, B-290644.2, June 10, 2003, 2003 CPD 112.
20. Protester must show that it was obligated to pay the attorneys fees (e.g., invoice or retainer). Contingent fees are not reimbursable. Protester must also prove that the requested hourly rate is customary in the attorney's locale (e.g., surveys or market analysis). *TRS Research – Costs*, B-290644.2, 2003 CPD 112.
21. Interest on claim is not allowed. Blue Rock.
22. Costs incurred by a corporate employee are measured by that person's salary, even if they are also an attorney. No attorneys fees are payable in such a case. *A1 Procurement JVG,* B-404618.2, Apr. 4, 2012.

21.9 Time for Decision
21.10 Express Option
21.11 Effect of Judicial Proceedings
21.12 Distribution of Decisions
21.13 Nonstatutory Protests
21.14 Reconsideration

SUBSTANTIVE ISSUES

Standard of Review

1. Each federal procurement stands on its own. *Tomahawk Constr. Co.,* B-254938, Jan. 27, 1994, 94-1 CPD 48.
2. When a regulation is published in the Federal Register and CFR, bidders are put on constructive notice of its contents. *Gurley's, Inc.,* B-253852, Aug. 25, 1993, 93-2 CPD X.
3. Protesters are charged with constructive notice of the contents of a synopsis published in CBD since it si the official public medium for identifying proposed contract actions. *Herndon & Thompson,* B-240748, Oct. 24, 1990, 90-2 CPD 327.
4. In reviewing allegations of impropriety in technical evaluation, we do not independently evaluate proposals or substitute our judgment for that of the evaluators; but rather review to assure the evaluation was reasonable and consistent with the solicitation and applicable law and regulations. Proteus Corp., B-270094, 96-1 CPD 165 at 4 (2/8/96).
5. Protester's mere disagreement with the evaluation does not render it unreasonable. Corvas, Inc., B-244766, 91-2 CPD 454 at 5 (11/13/91).
6. Although procurement is conducted under FAR Part 8, where "the agency intends to use vendors' responses as the basis of a detailed technical evaluation and price/technical tradeoff, it may elect . . . to use an approach that is like a competition in a negotiated procurement. We will review the agency's actions to ensure that the evaluation is reasonable and consistent with the terms of the solicitation." OSI Collection Services, Inc., B-286597.3, June 12, 2001, 2001 CPD 103; Comark Fed. Sys., B-278343, 1/20/98, 98-1 CPD 34.
7. Under an RFQ, agency may consider late proposals. KPMG Consulting, LLP, B-290716, 9/23/02, 2002 CPD 196.
8. Protester relying on information and belief must substantively rebut the agency report. Otherwise, such issues are deemed abandoned. *LSS Leasing Corp.*, B-259551, 4/3/95, 95-1 CPD 179, n.6.
9. Mere inference and speculation do not establish a valid basis for protest. *Computers Universal, Inc.*, B-296501, 8/18/05, 2005 CPD 161, n.3; GAO regulations "require that a protester provide a statement of legal and factual grounds that are sufficient to establish a reasonable potential that the protester's allegations have merit, and that bare allegations or speculation are insufficient to meet this requirement." *U.S. Aerospace, Inc.*, B-403464, Oct. 6, 2010, 2010 CPD ¶225; The regulations also "require that a protest include a detailed statement of the legal and factual grounds for the protest. This requirement contemplates that protesters will provide, at a minimum, either allegations or evidence for this Office to reasonably conclude that a violation of statute or regulation has occurred." *View One, Inc.*, B-400346, July 30, 2008, 2008 CPD ¶142.
10. Protester bears the burden of submitting probative evidence to prove its case, an this burden is not met where the only evidence is protester's self-serving

statements which conflict with the agency report. *Golten Marine Co., Inc.*, B-228398.2, Apr. 18. 1988, 88-1 CPD 372; *US Materials Co.*, B-216712, Apr. 26, 1985, 85-1 CPD 471.

11. The mere allegation that a solicitation is ambiguous does not make it so; rather, it is ambiguous only where, when read as a whole, it is susceptible of more than one reasonable interpretation. *Tri-Cities Tool, inc.*, B-238377, Apr. 18, 1990, 90-1 CPD 401.

The Agency Record

A. GAO

1. Agency has responsibility to adequately document its source selection decision, to demonstrate that it is not arbitrary. Therefore, it is premature to destroy source selection documents prior to the award. *The Community Partnership LLC*, B-286844, Feb. 13, 2001, 2001 CPD 38; *Mar, Inc.*, B-278929.2, Sept. 28, 1998, 98-2 CPD 92.
2. GAO will not address challenges based on comments of individual evaluators, rather than the consensus evaluation, because the consensus is the basis of award. *PAI Corp.*, B-298349, Aug. 18, 2006, 2006 CPD ¶124.
3. Evaluators' individual notes and worksheets may or may not be necessary to determine the reasonableness of the agency's evaluation. *The Community Partnership LLC*, B-286844, Feb. 13, 2001, 2001 CPD 38; *Southwest Marine, Inc.*, B-265865.3, Jan. 23, 1996, 96-1 CPD 56.
4. GAO's document production rules are narrower than the rules of civil procedure, which allow litigants to seek documents reasonably calculated to lead to admissible evidence. Only relevant documents need be produced at GAO. *The Boeing Co.*, B-311344, June 18, 2008.
5. Where the protest does not challenge any aspect of the procurement besides the evaluation of the protester's own proposal, the agency may properly limit its report to documentation regarding that evaluation. *Applied Technology Systems, Inc.*, B-404267, Jan. 25, 2011, n. 10.
6. When only certain discrete aspects of an evaluation are challenged, agency production of less than the entire record is consistent with GAO rules. *Chicataw Constr. Inc.*, B-289592, Mar. 30, 2002, 2002 CPD ¶62.
7. GAO gives greater weight to contemporaneous evaluation and source selection materials, than to the parties' later explanations, arguments or testimony. *Rosemary Livingston-ATO*, B-401102.2 (July 6, 2009), citing *Boeing Sikorsky Aircraft Support*, B-277263.2, Sept. 29, 1997, 97-2 CPD ¶91.
8. Where bias is alleged, the administrative record will not be complete or sufficient to prove or disprove the allegations. Therefore, the court will entertain extra-record evidence and permit discovery when there is a strong showing of bad faith or improper behavior. The strong showing must rest on an evidentiary foundation, not suspicion or conjecture. *Pitney-Bowes Government Solutions, Inc. V. US*, Fed.Cl. _, 2010 WL 2301188 (May 28, 2010).

9. Rating sheets may not be destroyed. Otherwise, the record will not constitute a complete history of the procurement, in violation or FAR 4.801. *Pitney-Bowes Government Solutions, Inc. V. US,* xx Fed.Cl. xx, 2010 WL 2301188 (May 28, 2010).
10. Motions to supplement the record in bid protests are governed by *Axiom Resource Mgmt., Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009). "[S]upplementation of the [administrative] record should be limited to cases in which 'the omission of extra-record evidence precludes effective judicial review.'" *Pitney Bowes Government Solutions, Inc. v. United States*, xx Fed. Cl. xx, 2010 WL 2301188 (May 28, 2010).
11. Destroying individual evaluation worksheets is unobjectionable where the consensus evaluation materials relied on by the agency support the agency's judgments regarding the relative merits of proposals. *Joint Mgmt. Tech. Serv.,* B-294229, Sep. 22, 2004, 2004 CPD ¶208.
12. An agency's source selection plan is an internal guide that does not give rights to parties; it is the RFP's evaluation scheme, not internal agency documents such as source selection plans, to which an agency is required to adhere in evaluating proposals. *Meadowgate Technologies, LLC,* B-405989, Jan. 17. 2012, 2012 CPD ¶27, n. 7.

B. COFC

1. "Supplementation of the record should be limited to cases in which the omission of extra-record evidence precludes effective judicial review." *Axiom Resource Mgmt., Inc. v. United States,* 564 F.3d 1374 Fed. Cir. 2009).
2. Permissible evidence includes omitted materials that were considered by the CO, or which existed and should have been considered, *Acrow Corp. v. United States*, 96 fed. Cl. 270 (2010), or where it is unclear if the documents were before the CO but could have been. *RN Expertise, Inc. v. United States,* 2010 US Claims LEXIS 439.
3. Evidence may be admitted when the agency failed to consider it, but should have. *Diversified Maint. Sys., Inc. v. United States,* 93 Fed. Cl. 794 (2010).
4. Evidence may be admitted when the record is confused or has unexplained inconsistencies. *Diversified Maint.*

Solicitations

1. In negotiated procurement, agency has broad discretion to cancel a solicitation, with only a reasonable basis. *VSE Corp.*, B-290452.2, 2005 CPD 111 at 6 (4/11/05); *Cattlemen's Meat Co.*, B-296616 (8/30/05), 2005 CPD 167. It may do so in A-76 competitions, and regardless of when the information precipitating the cancellation first surfaces. *Satellite Services, Inc.*, B-288843.3, Apr. 28, 2003, 2003 CPD 88. It may do so for lack of funding. *Quality Support, Inc.,* B-296716 (Sep. 13, 2005), 2005 CPD 172.

2. Cancellation of an IFB before bid opening is a matter primarily within the discretion of the agency. GAO will not disturb that decision absent clear proof of an abuse of that discretion. *Brackett Aircraft Radio Co.,* B-244831, Dec. 27, 1991, 91-2 CPD X. A contracting officer must have a compelling reason to cancel an IFB after bid opening. *P&C Construction,* B-251793, Apr. 30, 1993, 93-1 CPD 361.
3. Agency may cancel a solicitation, even if it has already negotiated with offerors, and may even do so in order to issue an identical solicitation later, where its needs have changed, it can achieve cost savings, or increase competition. *SEI Group, Inc.*, B-299108 (2/6/07).
4. Cancellation is reasonable when the solicitation does not accurately reflect the agency's needs, where no offeror meets the specifications, where the solicitation must be significantly altered, or where funding is no longer available. It is appropriate at any time, no matter when the information first surfaces, even if discovered during a protest. *Knight's Armament Co.*, B-299469 (4/7/07).
5. Agency is not required to follow a source selection plan. It is for internal guidance only. *Bristol-Myers Squibb Co.*, B-281681.12, December 16, 1999, 2000 CPD ¶23. Similarly, it need not follow an internal evaluation plan if not part of the solicitation. *Litton Systems, Inc.*, B-239123, Aug. 7, 1990, 90-2 CPD ¶114, n. 6.
6. To the extent an offeror disagrees with the agency's interpretation of a requirement (e.g., educational levels), the solicitation is patently ambiguous, and the offeror must seek clarification prior to the due date for proposals. *Smart Innovative Solutions,* B-400323.3 (November 19, 2008).
7. Agency need not disclose subfactors if they are reasonably related to the stated factors *Rod Robertson Enter., Inc.*, B-4-4476, Jan. 31, 2011, 2011 CPD ¶129.
8. Agency need not disclose life-cycle cost formulas or calculations. *NCS Technologies, Inc.*, B-405192.2, Oct. 27, 2011.
9. Under the Uniform Time Act, there is one standard time for most governmental purposes, including the date for the receipt of proposals, and that time is the local time, whether referred to as standard or daylight savings time. Thus, a proposal received after the local time designated, is late, even if that time is misdesignated as standard time when daylight time is in effect. *Environmental Control Division, Inc.*, B-255181, Feb. 16, 1994, 94-1 CPD ¶115; *SBBI, Inc.*, B-405754, No. 23, 2011.

Non-Responsive Proposal

1. A proposal that fails to conform to material terms and conditions of the solicitation is unacceptable, and may not form the basis of an award. *LexisNexis, Inc.*, B-299381 (4/17/07); *Barents Group LLC*, B-276082, 97-1 CPD 164 at 10 (5/9/97); By refusing to contractually commit to a required timeframe for providing services, the protester has taken exception to a material requirement. *The Boeing Co.*, B-311344, June 18, 2008.

2. The test for responsiveness is whether the bid, as submitted, represents an unconditional offer that will bind the contractor upon acceptance, to perform the exact thing solicited in accordance with the IFB. *Seaward Corp.*, B-237107.2, June 13, 1990, 90-1 CPD 552. Unless something on the face of the bid either limits, reduces, or modifies the obligation of the prospective contractor to perform in accordance with the terms of the IFB, the bid is responsive. *Hughes Georgia, Inc.*, B-2344936, Nov. 13, 1991, 91-2 CPD X.
3. Source selection plans are internal instructions. They don't create rights in outsiders. *National Steel & Shipbuilding*, B-250305.2, 3/23/93, 93-1 CPD 260.
4. Where offeror ignores clear RFP requirements as to format of proposal submission, agency need not give it consideration, where RFP advises that non-conforming proposals will be rejected. *Mathews Associates, Inc.*, B-299305 (3/5/07). But, where RFP merely says that proposals "may" be rejected, agency needs a reasonable basis before excluding the proposal. *McFadden & Assoc., Inc.*, B-275502, 97-1 CPD 88 (2/27/97).
5. Agency is under no obligation to parse the protester's proposal to determine if it complies with the RFP. By placing the information in an appendix and requiring the agency to piece together the proposal's content, protester fails its responsibility to demonstrate compliance. *LexisNexis, Inc.*, B-299381 (4/17/07).

Responsibility

1. Once an offeror has been determined to be "responsible", there is no need to make an additional determination during contract performance. No need to make such a determination when exercising options, or when ordering from the GSA Schedules. *Advanced Technology Systems, Inc.*, B-296493.6, Oct. 6, 2006, 2006 CPD 151.
2. Failure to comply with the "Limitation on Subcontracting" Clause, 52.219-14 (50% labor requirement), is a matter of responsibility, and compliance is a matter of contract administration. However, if the proposal, on its face, shows failure to comply, then this is a matter if technical acceptability, and a non-conforming proposal is not eligible for award. *Chapman Law Firm v. US*, 63 Fed. Cl, 519, 527 (2005), affd in part, revd in part, 490 F.3d 934 (2007); *KIRA, Inc.*, B-287573.4, Aug. 29, 2001, 2001 CPD ¶153.

Competitive Range

1. Agencies have broad discretion in establishing the competitive range. *Computer & Hi-Tech Mgmt., Inc.*, B-292235.4, 2004 CPD 45.
2. Agencies are not required to retain proposals in the competitive range that they reasonably conclude have no realistic chance for award, and therefore may exclude proposals from the competitive range if they have no reasonable prospect of award, even if that leaves a range of only one proposal. *Brian X. Scott*, B-298568, 2006 CPD 156 (Oct. 26, 2006).
3. Before eliminating proposals, agencies must perform an evaluation of all stated factors, including price. *Meridian Mgmt. Corp.*, B-285127, 2000 CPD 121.

4. There is no magic number for an "efficient" competitive range. *See, e.g., Molina Engrg., Ltd.*, B-284895, 2000 CPD 86 (12 proposals reduced to a range of 2); *Northwest Procurement Institute, Inc.*, B-286345, 2000 CPD 192 (3 reduced to 2); and *Matrix General, Inc.*, B-282192, 99-1 CPD 108 (10 reduced to 3).

Discussions

1. "We review the adequacy of discussions to ensure that agencies point out weaknesses that, unless corrected, would prevent an offeror from having a reasonable chance for award. An agency is not required to afford offerors all encompassing discussions, or to discuss every aspect of a proposal that receives less than the maximum score, and is not required to advise an offeror of a minor weakness that is not considered significant, even where the weakness subsequently becomes a determinative factor in choosing between two closely ranked proposals. *Northrop Grumman Info. Tech., Inc*., B-290080, June 10, 2002, 2002 CPD 136 at 6; *Apptis, Inc.*, B-403249, 2010 WL 4196032 (Discussions of non-significant weaknesses is discretionary with he agency. An agency's designation of concerns as significant or not will be reviewed for reasonableness).
2. "Agencies are not required to notify offerors of deficiencies remaining in their proposals or to conduct successive rounds of discussion until omissions are corrected." *Culver Health Corp.*, B-242902, June 10, 1991, 91-1 CPD 556 at 6; *Mechanical Equip. Co., Inc.*, B-292789.2, Dec. 15, 2003, 2004 CPD 192.
3. "Although discussions must be 'meaningful,' that is, sufficiently detailed so as to lead an offeror into areas of its proposal requiring amplification or revision, an agency is not required to "spoon feed" an offeror as to each and every item that must be revised to improve their proposal or to achieve the maximum score, *Uniband, Inc.*, B–289305, Feb. 8, 2002, 2002 CPD para. 51, or hold successive rounds of discussions until all proposal defects have been corrected." *Symplicity Corp.,* B-297060, Nov. 8, 2005, 2005 CPD ¶203.
4. Agency is not required to hold discussions, if it has reserved the right to do so. *Gemmo-CCC,* B-297447.2, July 13, 2006, 2006 WL 3615167.
5. An agency has no obligation to re-open discussions to address weaknesses introduced into a proposal after final revision. *Smiths Detection, Inc.*, B-298838.2, Dec. 22, 2006, 2006 WL 3933304, n. 13.
6. Agencies may, in their discretion, conduct discussions only concerning cost/price, and permit revisions only to the cost/price proposal. *Paramax Systems Corp.,*, B-253098, Oct. 27, 1993, 93-2 CPD 282.
7. Agency has discretion to inform offeror that its price is too high, but has no duty to do so, especially where price is not unreasonable or considered a significant weakness or deficiency. *Cherokee Information Services,* B-287270, April 12, 2001, 2001 CPD 77.
8. "If an offeror's price is not so high as to be unreasonable and unacceptable for contract award, the agency may reasonably conduct meaningful discussions without advising the higher-priced offeror that its prices are not competitive." *MarLaw-Arco MFPD Mgmt.*, B-291875, Apr. 23, 2003, 2003 CPD 85 at 6; *Mechanical Equipment Co., Inc.*, B-292789.2, Dec. 15, 2003, 2004 CPD 192

(prices were fair and reasonable for the approach); *Integrated Concepts & Research Corp.,* B-309803, Oct. 15, 2007, 2007 WL 5273748.

9. When the price differential between the protester and awardee is the result of differing technical approaches, and protester's price is reasonable for its approach, agency need not raise the issue of price in discussions with protester. *DeTekion Security Systems, Inc.,* B-298235, July 31, 2006, 2006 CPD 130; *Grove Resource Solutions, Inc.*, B-296228, July 1, 2005, 2005 CPD 133; *AJT & Assoc., Inc.*, B-284305, March 27, 2000, 2000 CPD 60 (discussions not required when costs appeared reasonable for the approach taken, and a re-write would be required to achieve any significant cost reduction.).
10. An awardee whose proposal should have been (but was not) rejected for failing to comply with a material term of the RFP has been deprived of meaningful discussions if the issue was not raised by the agency. *Tybrin Corp.*, B-298364.6 (3/17/07).
11. Offerors may not rely on statements by the agency in discussions, that materially deviate from the solicitation. *IBM Corp.*, B-299504, June 4, 2007.
12. In Brooks Act procurements, the FAR 15 rule on control of discussions does not apply. *HydroGeoLogic, Inc.*, B-311263, May 27, 2008, 2008 CPD ¶218.

Evaluation of Proposals

1. Source selection officials have broad discretion in determining the manner and extent to which they make use of technical and evaluation results, subject only to the tests of rationality and consistency with the RFP's evaluation criteria. *Grey Advertising, Inc.*, B-184825, May 14, 1976, 76-1 CPD 325.
2. "Source selection officials may reasonably rely upon the expert advice and evaluation recommendations of the evaluation committee and need not actually read the proposals to make an integrated assessment of the proposals and a reasonable award selection." *KRA Corp.,* B-278904, 98-1 CPD 147 at n. 5 (4/2/98).
3. Mere disagreement with the evaluations and award decision does not render them unreasonable. *ESCO, Inc.*, B-225565, Apr. 29, 1987, 87-1 CPD 45.
4. "The selection of individuals to serve as evaluators is within the discretion of the contracting agency, and we will not review the qualifications of board members absent a showing of possible fraud, bad faith, or a conflict of interest." *Geographic Resource Solutions*, B-260402, June 19, 1995, 95-1 CPD ¶278 (Brooks Act); *Lexis/Nexis, Inc.*, B-299381, Apr. 17, 2007, 2007 XCPD 73, n.4. In brooks Act procurements, members need only have collective experience. *IDG Architects*, B-235487, Sep. 18, 1989, 89-2 CPD ¶236.
5. Close scores are not necessarily equal; an agency can conclude that relatively minor point differentials represent actual superiority. *General Offshore Corp.*, B-271144, 7/2/96, 96-2 CPD 42.
6. Agency need not disclose subfactors, if inherently included in factors. *KMS Fusion, Inc.*, B-242529, May 8, 1991, 91-1 CPD 447.
7. Agencies are not required to inform offerors of their specific rating methodology. *Lexis-Nexis*, B-260023, May 22, 1995, 95-2 CPD 14.

8. It is an offeror's responsibility to submit a well-written proposal, with adequately detailed information which allows a meaningful review by the agency. *IBM Corp.,* B-299504, June 4, 2007, 2008 CPD ¶64; *OSI*, June 12, 2001.
9. It is the offeror's burden to submit an adequately written proposal. Even an incumbent must submit all requested information necessary to demonstrate its capabilities. *HealthStar VA, PLLC,* B-299737, June 22, 2007.
10. Agency is not required to piece together disparate parts of the firm's proposal and compare them to the RFP in order to discern what the protester actually intended. *Interaction Research Inst., Inc.*, B-234141.7, June 30, 1989, 89-2 CPD 16.
11. Offerors must prepare proposals in the format established by the solicitation, including page limitations. If the solicitation provides that proposals exceeding the limit will be rejected, then rejection is not objectionable. *GEA Engrg., PC,* B-405318, Oct. 13, 2011.
12. "Point scores and adjectival ratings are only guides to assist source selection officials in evaluating quotations; they do not mandate automatic selection of a particular proposal." KPMG Consulting LLP, B-290716, Sept. 23, 2002, 2002 CPD 196.
13. "It is well established that ratings, be they numerical or adjectival, are merely guides for intelligent decision-making in the procurement process. " *Mechanical Equipment Co., Inc.***,** B-292789.2, Dec. 15, 2003, 2004 CPD 192.
14. "The number of strengths, deficiencies or weaknesses noted in an offeror's proposal does not dictate what overall adjectival rating a proposal receives….Adjectival ratings, like scores, are useful guides to intelligent decision-making; they are not binding on the SSA." *Smiths Detection, Inc.*, B-298838.2, Dec. 22, 2006, 2006 WL 3933304.
15. "The evaluation of technical proposals is generally a matter within the agency's discretion, which our Office will not disturb unless it is shown to be unreasonable or inconsistent with the RFP's evaluation criteria. . . . [A] protester's mere disagreement with the agency's judgment does not render an evaluation unreasonable. . . . Further, there is no legal requirement that an agency must award the highest possible rating, or the maximum point score, under an evaluation factor simply because the proposal contains strengths and/or is not evaluated as having any weaknesses. . . . To the extent [a protester] asserts that the agency was required to assign an 'excellent' rating, and maximum point scores, for subfactors where [the protester's] proposal was evaluated as having strengths and/or no weaknesses, the protest fails to state a valid basis." *Applied Technology Systems, Inc.*, B-404267, Jan. 25, 2010.
16. When utilizing point scores, an agency need not demonstrate with mathematical certainty how the rating was derived, but need only show it was consistent with the stated evaluation criteria and supporting documentation. *Magellan Health Services,* B-298912, Jan. 5, 2007, 2007 WL 1469049.
17. There is no requirement that an agency create a consensus report when evaluating proposals, nor does ever evaluator's scoring sheet have to track the final evaluation report. *Smart Innovative Solutions,* B-400323.3 (November 19, 2008).

18. Final ratings need not be consistent with earlier individual ratings; the overriding concern is whether they reflect the relative merits of the proposal. *Domain Name Alliance Registry*, B-310803.2 (Aug. 18, 2008).
19. The fact that the agency does not retain evaluators' notes does not, alone, render the record inadequate for review. *Hydraudyne Sys. & Engrg., BV,* B-241236, Jan. 30, 1991, 91-1 CPD 88.
20. In Lowest Priced/Technically Acceptable procurement, the agency may not conduct negotiations past the point at which a proposal is rated acceptable. *Rosemary Livingston-ATO*, B-401102.2 (July 6, 2009).
21. For procurements conducted under FAR Part 8, FAR 8.405-2(f) designates limited documentation requirements. "[a]n agency's evaluation judgments must be documented in sufficient detail to show that they are reasonable." GAO's review "considers whether the record as a whole provides an adequately documented and reasonable basis for the source selection." (SSA had a thorough discussion of strengths and weaknesses, even though evaluators' reports were lacking). *Delta Building Services, Inc.,* B-405327.2, Oct. 21, 2011.

Price/Cost Evaluations

1. Agencies are given broad latitude in establishing methods to evaluate price proposals. The FAR expressly provides that an ICGE is an appropriate pricing method. *MED Trends, Inc. v. United States,* _____ Fed. Cl. ___, 2011 WL 4037418 (Sep. 13, 2011) (on appeal).
2. A determination regarding price reasonableness is a matter of agency discretion, which GAO will not disturb absent a showing that the decision was unreasonable or made in bad faith. *United States Elevator Corp.,* B-241772, Mar. 5, 1991, 91-1 CPD 245.
3. Agency may base price reasonableness determination on comparisons with government estimates, past procurement history, current market conditions, or any other relevant factors, including any revealed by the competition received. *Bristol Machining & Fabrication, Inc.,* B- 244490, Oct. 7, 1991, 91-2 CPD 315.
4. There is nothing legally objectionable in the submission or acceptance of a below-cost offer in a fixed-price contract setting. *Intown Properties, Inc.,* B-256742, Jul. 11, 1994, 94-2 CPD 18. A price is not unrealistic simply because it is slightly lower than the government's estimate. *EAI Corp.,* B-283541, Dec. 6 1999.
5. When an agency evaluates a proposal for a cost-reimbursement contract, an offeror's estimated cost is not dispositive because the Government is bound to pay the actual costs. So, the agency must perform a cost realism analysis. It need not, however, conduct an in-depth analysis or verify each item; it must only exercise informed judgment, and the method used must be reasonably adequate and provide some measure of confidence that the rates are reasonable and realistic in view of other cost information available at the time. GAO will review this analysis only to determine if it was reasonably based and not arbitrary. Actual or historical costs may be used as a basis. *Palmetto GBA, LLC*, B-298962 (1/16/07).

6. GAO's review of a cost realism analysis is limited to determining whether the cost analysis is reasonably based and not arbitrary. When an agency determines that adjustments to an offeror's proposed costs are necessary, it must then base its source selection decision on the adjusted cost. *Magellan Health Services*, B-298912, Jan. 5, 2007, 2007 WL 1469049.
7. Cost realism analysis is required when evaluating a cost-reimbursement contract. *IBM Corp.*, B-299504, June 4, 2007. There is no requirement to do so when evaluating a T&M proposal using fixed-price labor rates, although the agency may provide for such an evaluation in the solicitation. In contrast, in procurements involving fixed-price contracts, or portions of contracts, the agency may provide in the RFP for the use of price realism analysis, for the limited purpose of measuring an offeror's understanding of the requirements or to assess risk in a proposal. Price realism analysis can affect the technical evaluation, but cannot result in an adjustment of an offeror's fixed price. *Id.*
8. Where anticipated requirements cannot be reasonably ascertained, agency may establish a reasonable hypothetical or notional plan to provide a common basis for evaluating costs. *The Boeing Co.*, B-311344, June 18, 2008.
9. Where an offeror proposes to hire the incumbent workforce at lower compensation than they currently receive, it is reasonable for the agency to conclude that the proposal presents a risk that the offeror will not be able to hire the incumbent workforce. The agency needs to look at total compensation, not just salary. *MacAulay-Brown, Inc.*, B-292515, Sep. 20, 2003, 2003 CPD ¶190.

Past Performance

1. The evaluation of past performance, including an agency's assessments regarding relevance, scope, and significance of the offeror's performance history, is a matter of agency discretion, which we will not disturb unless those assessments are unreasonable, inconsistent with the solicitation criteria, or undocumented." *Applied Technology Systems, Inc.*, B-404267, Jan. 25, 2010.
2. The evaluation of past performance is a matter of agency judgment, and GAO will not substitute its judgment. It will question such conclusions where not reasonably based or less than adequately documented. B-270538.2, 96-2 CPD 98 (9/12/96).
3. GAO "will examine an agency's past performance evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of an offeror's past performance is primarily a matter within the contracting agency's discretion….an agency has discretion to determine the scope of the offerors' performance histories to be considered, provided all proposals are evaluated on the same basis and consistent with the solicitation requirements….An agency may base its evaluation of past performance upon its reasonable perception of inadequate past performance, regardless of whether the contractor disputes the agency's interpretation of the facts. OSI.

4. FAR 15.306 requires agencies to allow competitive range offerors to address adverse evaluations that they have not previously had a chance to rebut. *American Combustion Ind., Inc.*, B-275057, 97-1 CPD 105 (3/5/97).
5. Neutral scores: GAO allows use of "mid-point". *Chicataw Constr. Co., Inc.*, B-289592, Mar. 20, 2002, 2002 CPD ¶62; Agency can award to higher-priced offer with good past performance, over lower-priced offer with neutral past performance. *Phillips Ind., Inc.*, B-280645, Sep. 17, 1998, 98-2 CPD 74; COFC requires ignoring it. *Metcalf Constr. v. US*, 53 Fed. Cl. 617 (2002).
6. There is no requirement for the agency to check all references. *Quality Elevator Co., Inc.*, B-271899, Aug. 28, 1996, 96-2 CPD 89. *Black & Veatch Spec. Projects Corp.*, B-279492, June 26, 1998, 98-1 CPD 173. there is no requirement that agency make the same number of attempts to contact each offeror's references. Agency is only required to make a reasonable effort. OSI.
7. Agencies may reasonably rely on their personal knowledge of offeror, and may use references not listed in the proposal. *Black &* Veatch, B-279492.2, 98-1 CPD 173 (6/26/98).
8. "An agency may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror." *Health Net Federal Services, LLC,* B-401652.3, Nov. 4, 2009, *citing Perini/Jones Joint Venture,* B-285906, Nov. 1, 2000, 2002 CPD 68. The relevant consideration is whether the resources – workforce, management, facilities – will be provided or relied upon for performance, such that the parent or affiliate will have meaningful involvement in contract performance. *Ecompex, Inc.,* B-292865.4, 2004 CPD ¶149.
9. GAO did not question DOL's use of evaluation scheme that rated new and experienced offerors differently. *Career Innovations, Inc.,* B-404377.4, May 24, 2011.
10. Agency need not afford an offeror the chance to address adverse past performance in a Brooks Act procurement. That is a right under FAR part 15, which is not applicable to the Brooks Act. *SEI Group, inc.*, B-400829, Feb. 13, 2009, 2009 CPD ¶51.
11. The question whether prior performance deficiencies were excusable is a matter of contract administration and is not for resolution by the GAO. *E. Huttenbauer & Son, Inc.,* B-252320, June 29, 1993, 93-1 CPD ¶499.

Cost/Technical Trade-Off Analysis

1. The analysis must be fully documented and include the rationale, and the benefits associated with any additional cost. *Opti-Lite,* B-281693, 99-1 CPD 61 (3/22/99).
2. "[I]n performing a cost/technical tradeoff there is no requirement that a selection official dollarize the process by making a precise mathematical calculation that an additional dollar will be paid only if there is a corresponding discrete technical advantage." *KRA Corp*, B-278904, 98-1 CPD 147 (4/2/98); *Marion Composites*, B-274621, 96-2 CPD 236 at 8, n. 5 (12/20/96).

3. Even where the award decision lacks detail, the Court can infer that the CO was fully aware of the significant differences in technical and past performance ratings, and in light of the RFQ's weighting of those factors, the award may be warranted. Thus, based on superior ratings, and despite a significant difference in price, there can be a rational basis for award, and it would be pointless to remand to the CO merely to confirm that. *MED Trends, Inc. v. United States*, ____ Fed. Cl. ___, 2011 WL 4037418 (Sep. 13, 2011).
4. Agency cannot use a purely mechanical methodology, unless it is set forth in the RFP and it is structured to encompass a reasoned trade-off. *Opti-Lite*, *Id.*; "An award decision is not reasonable where there is no documentation or explanation to support the price/technical tradeoff and where the agency makes its award decision based strictly on a mechanical comparison of the offerors' total point scores." *Midland Supply, Inc.*, B-298720 (11/29/06).
5. BUT: it is permissible to use a formula in the RFP that already accounts for technical merit and cost. B-280429, 98-2 CPD 118 (9/30/98); B-271144.2, 96-2 CPD 42 at 7-8 (7/2/96).
6. Use of a predetermined formula to mechanically select awardee is generally disfavored as a restriction of selection authority's discretion. *Medical Development Intl.*, B-281484.2, 99-1 CPD 68 (3/29/99).
7. While the GAO accords greater weight to contemporary evidence, it will consider post-protest explanations that provide a rationale for contemporaneous conclusions, so long as they are credible and consistent with the contemporary record. *Wackenhut Services, Inc.*, B-286037, 11/14/00, 2001 CPD ¶114.
8. The failure to mention certain evidence doesn't mean that it was not considered. *Interspiro, Inc. v. US*, 72 Fed. Cl. 672 (2006), *aff'd,* 227 Fed. Appx. 924 (2007).
9. In FAR Part 8 procurements, the propriety of a cost/technical trade-off analysis turns on whether the SSA's judgment "concerning the significance of the difference was reasonable and adequately justified in light of the RFP evaluation scheme." *Digital Systems Group, Inc.*, B-286931, Mar. 7, 2001, 2001 CPD 50. Even where the SSA does not specifically discuss the trade-off, the GAO will not object if the trade-off is otherwise reasonable based on the record. *PRC, Inc.*, B-274698.2, Jan. 23, 1997, 97-1 CPD 115; and if the SSA's decision is documented in sufficient detail to show it is not arbitrary, then the failure to discuss every detail regarding the relative merit of the proposals does not affect the validity of the decision if the record shows the award was reasonable. *EER Systems, Inc.*, B-290971.3, Oct. 23, 2002, 2002 CPD 186.

Competition; Sole Source; Use of GSA Schedules

1. Simplified acquisitions are an exception to the rule of "full and open" competition. Agencies need only obtain competition "to the maximum extent practicable." *Logan, LLC*, B-294974.6 (12/1/06).
2. The use of FSS procedures satisfies the statutory requirement for competition. Generally, the solicitation of quotes from 3 vendors is adequate. The agency need not solicit the incumbent. *Allmond & Company*, B-298946 (1/9/07).

3. Use of the FSS is not evidence of bias against a non-Schedule vendor. *Information Ventures, Inc.*, B-299422 (May 1, 2007), 2007 CPD 88.
4. A protester without an FSS Contract is not an interested party to challenge a procurement limited to FSS holders. *Sales Resources Consultants, Inc.*, B-284943.2 (June 9, 2000), 2000 CPD 102.
5. Two or more FSS contractors may form a Contractor Team Arrangement, where each holds a contract, and each is responsible for its share of performance. *Kearney & Co.*, B-298436.2 (Oct. 4, 2006), 2006 CPD 149.
6. When an agency sets forth a reasonable justification for a sole-source procurement, the GAO will not object to the award. *Smith & Wesson, Inc.*, B-400479 (November 20, 2008). Product standardization, based on critical benefits (e.g., reduced logistical burden, spare parts administration, and training), is sufficient to support a sole-source decision. *Id.*

Incumbency/Unfair Advantage

1. While incumbency confers advantages, agency is not required to equalize them, unless there is evidence of preferential treatment or improper action. *Crofton Diving Corp.*, B-289271, Jan. 30, 2002, 2002 CPD 32; *SeaArk Marine, Inc.*, B-292195, May 28, 2003, 2003 CPD 108.
2. Incumbency, without more, does not constitute a conflict of interest or unfair competition. *Computer Universal, Inc.*, B-291890, April 8, 2003, 2003 CPD 81.
3. Where an agency allows an awardee to continue performance while corrective action takes place, a competitive advantage accruing to the awardee does not constitute an "unfair" advantage for which the agency is required to compensate. *Del-Jen Education & Training Group*, B-401787.3, May 4, 2010.

Organizational Conflicts of Interest

1. There are three kinds of OCIs: where the offeror is able to set the ground rules for the competition; where it has unequal access to information; and where it has impaired objectivity. *AT&T Government Solutions, Inc.*, B-400216 (Aug. 28, 2008).
2. It is responsibility of agency to determine if firm has an OCI; GAO will not overturn unless unreasonable. *Designers and Planners, Inc.*, B-221385, May 15, 1986, 86-1 CPD 463.
3. "Substantial facts and hard evidence are necessary to establish a conflict; mere inference or suspicion of an actual or apparent conflict is not enough." *Mechanical Equipt. Co., Inc.*,B-292789.2, Dec. 15, 2003, 2003 CPD 192.
4. The responsibility for determining whether an actual or apparent conflict will arise, and to what extent a firm should be excluded from the competition, rests with the contracting agency. GAO will not disturb a CO's finding unless it is unreasonable. Conflicts that might arise in the future are not susceptible of current decision. A mitigation plan that includes a firewall may be sufficient to address an "unequal access to information" OCI. *Axiom Resource Management, Inc.*, B-298870.3, Jul. 12, 2007.

5. An agency can reasonably reject a bid to avoid even the appearance of an impropriety. Contracting officers are given wide latitude in their business judgments to safeguard the Government's interests, but must ensure fair and equitable treatment of all contractors. *KAR Contracting, LLC*, B-310537, Dec. 19, 2007, 2007 CPD ¶226. GAO will not opine on 18 USC 207, a criminal statute regarding post-employment restrictions. Moreover, that law does not set the outer boundaries for a CO's determination of a conflict. *Id.*
6. The Contracting Officer must examine each situation on its particular facts to determine not only if an OCI exists, but also the appropriate means for resolving it. The agency must communicate its concerns to the affected offeror and provide an opportunity for it to respond. *AT&T Government Solutions, Inc.,* B-400216 (Aug. 28, 2008).
7. Where a firm may have gained an unfair competitive advantage through hiring a former government official, the firm can be disqualified from the competition based on the appearance of impropriety. *Health Net federal Services, LLC,* B-401652.3, Nov. 4, 2009.
8. "A CO must exercise 'common sense, good judgment, and sound discretion' in deciding both whether a potential conflict exists and 'the development of an appropriate means for resolving it.'" FAR 9.504(b); "The GAO will only overturn a CO's OCI decision if that decision was unreasonable." "Conflicts may arise in situations not expressly covered" by the FAR. "A CO should attempt to prevent [] unfair competitive advantage." *Turner Construction Co., Inc. v. United States,* Fed. Cl., (July 16, 2010), 2010 WL 2795079. "a bidder may be disqualified if the mere *appearance* of impropriety is indicated by hard facts." *Turner* citing *NKF Eng'g, Inc. v. United States,* 805 F.2d 372 (Fed, Cir. 1986). "the mere 'appearance of impropriety' is enough for a CO to disqualify a bidder *regardless* of '[w]hether or not inside information was *actually* passed....*" Turner, citing* NKF. "an unfair competitive is presumed to arise where an offeror possesses competitively useful nonpublic information that would assist that offeror in obtaining the contract, without the need for an inquiry as to whether that information was, actually, of assistance to the offeror." *Turner, citing L-3 Services,* B-400134.11, Sep. 3, 2009, n. 19.
9. Information that is outdated is not competitively useful. *Unisys Corp.,* B-403054.2, Feb. 8, 2011, 2011 CPD ¶61.

Bait & Switch

1. "Bait and switch" occurs when the an awardee represented that it would rely on the person, the agency relied on that representation, it was foreseeable that the person would not be available, and the person will not do the work. *Labat-Anderson, Inc. v. US*, 42 Fed. Cl. 806 (1999); *Cf. Planning Research Corp. v. US*, 971 F.2d 736 (Fed. Cir. 1992) (post-award substitution of personnel for persons the offeror never intended to supply).
2. It is permissible for an offeror to propose using an employee of the incumbent, even if that employee is under a non-compete agreement (at least where the

agreement did not prevent him from going to work for the offeror). *Orion Int'l. Tech. v. US*, 66 Fed. Cl. 569 (2005).

3. xxx

Small Business

1. Under the "non-manufacturer" rule, a small business must either make the product or provide one made by another small business. An offer which on its face shows an intent to supply a product made by a large company should have placed the CO on notice that the offeror is ineligible to bid as a small business. GAO will review the CO's failure to refer the matter to the SBA. Here, the CO acted unreasonably in not referring the issue. *Hydroid LLC*, B-299072 (1/31/07).
2. Generally, agency's judgment as to whether a small business can comply with the 50% "limit on subcontracting" rule is a matter of responsibility requiring referral to the SBA. However, where proposal on its face should lead to the conclusion that an offeror has not agree to comply, it is matter of the proposal's acceptability, i.e., a responsiveness question. That is for the agency to decide, since a non-conforming proposal cannot form the basis of award. *Tybrin Corp.*, B-298364.6 (3/13/07).
3. Agency is not required to set aside a procurement for service-disabled companies. Such set-asides are permissive, not mandatory. However, if an agency undertakes a service-disabled set-aside analysis, the conclusions it draws must be reasonable. *DAV Prime, Inc.*, B-311420 (May 1, 2008).
4. In a SDVOSB set-aside, the agency is not required to terminate a contract when the awardee is subsequently found by SBA (on hearing and appeal) to be ineligible for SDVOSB status. It may be appropriate for the agency to consider not awarding options to such an ineligible contractor. *Major Contracting Services, Inc.*, B-400416 (November 20, 2008).
5. Consideration of a HUBZone set-aside is mandatory under Small Business Act, and must be considered if two or more companies are available. By contrast, 8(a) set-asides are discretionary. *Mission Critical Solutions*, B-401057 (May 4, 2009).
6. In small-business set-aside, agency is required to give offerors pre-award notice of the selection. GAO will sustain a protest and recommend termination of a contract, where the agency did not give such notice, and the SBA later ruled the company "large." *Spectrum Security Services, Inc.*, B-297320.2, Dec. 29, 2005, 2005 CPD ¶227.
7. Task orders issued under the FSS are exempt from the set-aside requirements of FAR Part 19. *Global Analytic Info. Tech. Sys., Inc.*, B-297200.3, March 21, 2006, 2006 CPD 53.
8. Where an award has been made, and the SBA later determines the awardee is not eligible, the SBA regulations do not require the agency to terminate the award. The agency should consider whether it is appropriate to exercise options under that award. *Major Contracting Services, Inc.* , B-491472, Sep. 14, 2009, 2009 CPD 170, *recon. denied.*, B-401472.2, Dec. 7, 2009, 2009 CPD 250.

9. Bundling occurs when an agency combines several requirements under one award. Where requirements are split among several awards, there is no bundling. *BlueStar Energy Solutions,* B-405690, Dec. 12, 2011.

Constructive Debarment

1. Decision to temporarily suspend the issuance of orders under a BPA, while the agency investigates a company's conduct, is a matter of contract administration. Further, the GAO does not consider allegations of de facto suspension or debarment.. *Logan, LLC*, B-294974.6 (12/1/06).
2. xx

Good Faith, Bias

1. Government Officials are presumed to act in good faith. The protester must prove bad faith by convincing proof. *Cincom Systems, Inc. v. United States*, 37 Fed.Cl. 663, 669 (1997); *Sygnetics, Inc.*, B-404535.5, Aug. 25, 2011, CPD ¶164, fn. 3; *Opti-Lite Optical*, B-281693.2, 7/15/99, 99-2 CPD 20.
2. "We will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition." *A1 Procurement, JVG,* B-404618, Mar. 14, 2011, n. 5.
3. "Where bias is alleged, the administrative record frequently will not be complete or suffice to prove or disprove the allegation. Consequently, to address bias, the court will entertain extrarecord evidence and permit discovery when there has been a 'strong showing of bad faith or improper behavior' such that without discovery the administrative record cannot be trusted." "The strong showing must have an evidentiary foundation and not rest merely on counsel's argument, suspicion, or conjecture." *Pitney Bowes Government Solutions, Inc. v. United States*, xx Fed. Cl. xx, 2010 WL 2301188 (May 28, 2010).

Oral Statements

1. Oral statements by Government employees generally do not bind the Government. A competitor relies on such statements at its own risk. Crown Support Services, Inc. B-287070, 2001 CPD 33 at 3 n.1 (1/31/01).

Debriefings

1. The inadequacy of a debriefing is not an issue for the GAO. *American Artisan Productions, Inc.*, B-292559, Oct. 7, 2002, 2003 CPD 176, n.3; It 'is a procedural matter concerning an agency's actions after award, which are unrelated to the validity of the award itself." *Symplicity Corp.*, B-297060, Nov. 8, 2005, 2005 CPD ¶203, n. 4.
2. Delay in giving a debriefing is a procedural matter that does not affect the propriety of the award. *Designers and Planners, Inc.*, B-221385, May 15, 1986, 86-1 CPD 463.

3. An offeror excluded from further consideration must request a debriefing within three days after notice of exclusion, or else it is not entitled to either a pre-award or post-award debriefing. *Hawker Beechcraft Defense Co., LLC,* B-406170, Dec. 22, 2011.
4. Debriefing not required, since Protester is entitled to an Agency Report. *Enola-Caddell JV*, B-292387.2, Sept. 12, 2003, 2003 CPD 168, n.4.
5. A debriefing is required when "competitive proposals" are used. This occurs when the procurement is conducted under FAR Part 15 procedures. This is the case in A-76 competitions. *Rhonda Podojil*, B-311310 (May 9, 2008).
6. A debriefing is not required when FAR Part 13.5 (commercial item test-program) is used. *Major Contracting Services, Inc.*, B-400616, Nov. 20, 2008, 2008 CPD ¶214, n. 2; No debriefing is required under FAR Part 8. *Systems Plus, Inc. v. US*, 68 Fed. Cl. 206 (2005); *Ellsworth Assoc., Inc.*, 45 Fed. Cl. 388 (1999). A debriefing in a Brooks Act (FAR 36) procurement is not a "required" debriefing under CICA. *McKissack/URS partners,* B-406489.2, Apr. 13, 2012 (unpublished).
7. In an FSS procurement, where no debriefing is required, the timeliness rules for protests after debriefings do not apply, and protester must file within 10 days of learning the basis for its protest. *MIL Corp.*, B-279508.2 (Jan. 6, 2006), 2006 CPD 34.
8. Absent any affirmative indication from agency that the debriefing would remain open after the scheduled session, GAO considers it to have concluded. Follow-up questions do not extend the debriefing date for purposes of filing a protest. *New SI, LLC,* B-295209, Nov. 22, 2004, 2005 CPD 71.
9. While the FAR does not prescribe any particular format to request a debriefing, "a protester must reasonably communicate to an agency that it is, in fact, seeking a formal debriefing, rather than simply making a general informational request." *Coffman Specialties, Inc.,* B-400706.2, Nov. 12, 2008, 2008 CPD ¶211.

Prejudice

1. "Competitive prejudice is an essential element of a viable protest, and where no competitive prejudice is shown or is otherwise evident, our Office will not sustain a protest even if a deficiency in the procurement is evident." *Defense Technology, Inc.*, B-271682, July 17, 1996, 96-2 CPD 54.
2. Protester must show that, but for violation, it would have had a substantial chance of receiving the award. *McDonald-Bradley*, B-270126, Feb. 8, 1996, 96-1 CPD 54 at 3.
3. Even if protester received the best possible score, it would not have helped. *Black & Veatch Spec. Proj, Corp.*, B-279492, June 26, 1998, 98-1 CPD 173.
4. Protests involving procedural deficiencies will not be sustained where the protester suffers no competitive disadvantage or prejudice. *Automation Management Consultants, Inc.*, B-231540, Aug. 12, 1988, 88-2 CPD 145.

Corrective Action

1. Implementation of corrective action is within the sound discretion and judgment of the agency. *DynaLantic Corp.*, B-274944.5, 97-2 CPD 75 at 4 (8/25/97); contracting officers are entitled to broad discretion. *Domain Name Alliance Registry,* B-310803.2 (Aug. 18, 2008); *Omega World Travel, Inc. v. US*, 54 Fed.Cl. 570 (2002).
2. Agency discretion extends to deciding the scope of the proposal revisions, and the agency may reasonably limit revisions offerors may make, especially to address an unfair advantage. *Domain Name Alliance Registry,* B-310803.2 (Aug. 18, 2008).
3. GAO will not object to corrective action that places all offerors in the same competitive posture they enjoyed prior to the defect in the source selection process. *Henkels & McCoy, Inc.*, B-250875, Feb. 24, 1993, 93-1 CPD 174.
4. Generally, when discussions are reopened, offerors may revise any aspect of their proposals as they see fit, even portions not the subject of discussions. However, where agency has a reasonable basis, it may limit discussions in implementing corrective action. *Partnership for Response & Recovery,* B-298443.4, Dec. 18, 2006, 2007 CPD 3.
5. Corrective action, including reopening discussions, is proper, even if the awardee's price has been revealed. *Partnership for Response & Recovery,* B-298443.4, Dec. 18, 2006, 2007 CPD 3.
6. The risk of an auction is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action. *Cubic Corp. – Recon.*, B-228026.2, Feb 22, 1988, 88-1 CPD 174.
7. GAO won't question the manner of compliance, so long as it remedies the impropriety. *QuanTech, Inc.*, B-265869.2, 96-1 CPD 160 at 2 (3/20/96).
8. An agency may reevaluate proposals using the original evaluation panel. *Opti-Lite Optical*, B-281693.2, 99-2 CPD 20 (7/15/99).
9. Agency acted reasonably in awarding interim 8(a) contract while it took corrective action following a protest. *Basic Concepts, Inc.*, B-299545, May 31, 2007.
10. A short bridge contract, awarded non-competitively pending resolution of a protest, is permitted if it is justified. *Computers Universal, Inc.*, B-296536 (8/18/05); *STG, Inc.*, B-405082, July 27, 2011 (4-month bridge awarded to incumbent to maintain continuity of service, based on urgent and compelling need).
11. A challenge to the way an agency is conducting corrective action is analogous to a challenge to the solicitation, and must be timely filed. The protester cannot await the second award without raising its challenge. *Domain Name Alliance Registry,* B-310803.2 (Aug. 18, 2008).
12. Even if an award is defective, an agency may allow the awardee to continue performance while corrective action takes place, if there is a need for continuing services. The agency should take precautions to ensure that the awardee does not unduly benefit from such performance. *Cox & Associates CPAs, PC,* B-287272.2, June 7, 2001, 2001 CPD 102; *cited in Del-Jen Education & Training Group,* B-401787.3, May 4, 2010.

13. Standard for review of agency action when a court must review an agency's decision to follow a GAO recommendation: "the agency decision lacks a rational basis if it implements a GAO recommendation that is itself irrational." *Centech Group, Inc. v. United States*, 554 F.3d 1029 (Fed. Cir. 2009).
14. Corrective action provides no basis to revive an untimely issue, if the evaluation does not affect that issue. *Shaw-Parsons Infrastructure recovery Consultants, LLC*, B-401679.4, March 10, 2010, 2010 CPD ¶77, n. 13.

OMB Circular A-76 Competitions

1. GAO has no jurisdiction over protest against a streamlined competition, unless a solicitation is used. *Vallie Bray*, B-293840, 2004 CPD 52.
2. It is a longstanding rule that GAO will not hear a protest to a cost comparison until the agency appeals procedure has been exhausted. *Intellicom Support Services, Inc.*, B-234488, 2/17/89, 89-1 CPD 174; *but see William A. Van Auken*, B-235278, 2/6/04, 2004 CPD 20 n.1 (protest dismissed on standing; no position taken on this issue).
3. Only the ATO has standing to represent the in-house bidder. *Dan Duefrene*, B-293883, 4/19/04, 2004 CPD 82.
4. An ATO has no standing to protest on behalf of an employee group, where the competition was initiated (by public announcement of the study) prior to January 26, 2005. *James C. Trump*, B-299370 (2/20/07); *Alan D. King*, B-295529.6, 2006 CPD 44 (2/21/06).
5. Employees and unions have no standing at the COFC. *American Fed'n of Govt. Employees v. US*, 258 F.3d 1294 Fed. Cir. 2001).
6. An MEO, while not technically an offeror, is essentially a competitor. An A-76 proceeding is a public-private competition. Persons developing the PWS are expected to act in a neutral fashion, and cannot participate in the MEO Team. That would create a conflict, or the appearance of a conflict, which violates FAR 3.1. Apply the same conflict of interest rules to government personnel as to private competitors. GAO will presume that a conflict causes prejudice. *Dept. of the Navy – Recon.*, B-286194.7, May 29, 2002, 2002 CPD 76.
7. An A-76 competition is conducted under FAR Part 15, and therefore involves "competitive proposals." The losing offeror has a right to request a debriefing, and such a debriefing is "required" under law, even though not specifically provided under A-76. Failure to request a debriefing in a timely fashion precludes a timely protest. An agency tender official has the same rights as any private offeror, in order to assure a level playing field under A-76. *Rhonda Podojil – ATO*, B-311310 (May 9, 2008).
8. For a history of the changes to the CICA and GAO regulations concerning A-76 protests by employees, *see Mark Whetstone – Designated Employee Agent*, B-311284 (May 9, 2008).
9. A designated agent is not an interested party to bring a protest, where the agency seeks to award a contract for a function currently being performed by federal employees, but where the work of the contractor is supplemental and the federal employees will not be displaced. Unless federal jobs are at stake, the agent of such employees has suffered no prejudice, and therefore has no standing to challenge a

direct conversion of a function. *Mark Whetstone,* B-311284, May 9, 2008, 2008 CPD X ; *B.R. Hardison,* B-311275 (May 29, 2008).
10. A designated agent lacks standing to protest the "implementation" of an A-76 competition. *Bill Henson,* B-400060 (June 2, 2008).
11. Neither the ATO nor the Designated Employee Agent has standing to challenge issues other than "final selection of the source" in a competition initiated before January 1, 2004. The extended duration of a study beyond its allotted time is not an issue related to source selection. *Bruce Bancroft,* B-400404.2 (October 31, 2008).
12. A decision to in-source contracted work is "in connection with a procurement" under 1491(b)(1) of the Tucker Act. *Santa Barbara Applied Research, Inc. v. US,* COFC No. 11-86C (May 4, 2011). The incumbent also has standing as an "interested party" since its economic interests will be affected by in-sourcing.

"Back-Door" Protests Filed as Contract Claims

1. Board has jurisdiction over claim that agency breached duty to contractor to provide a fair opportunity to compete for task orders under IDIQ contracts. *L-3 Communications Corp.*, ASBCA No. 54920, 06-2 BCA 33,374; *Community Consulting, Intl.*, ASBCA No. 53489, 02-2 BCA 31940, 2002 WL 1788535 (8/2/02); *Burke Court Reporting Co.*, DOTCAB No. 3058 97-2 BCA 29323 (9/11/97).
2. In claim for breach, the appellant may recover bid and proposal costs (as reliance damages), if actually incurred and not already recovered as an indirect cost on other contracts, but will not recover lost profits unless it proves it would have received the award. *L-3 Communications Corp.*, ASBCA No. 54920, 2008 WL 2154902 (May 8, 2008).
3. The Court of Federal Claims is dubious of jurisdiction to consider such claims. *A&D Fire Prot., Inc. v. US*, 72 Fed.Cl. 126 (2006), and court has no jurisdiction over protest of a second award under a multiple award solicitation. *Automation Technologies, Inc. v. US*, 73 Fed.Cl. 617 (2006).
4.